

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 13, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP489-CR

Cir. Ct. No. 2012CF91

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL J. MERKT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Washington County: TODD K. MARTENS, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Paul J. Merkt appeals from a judgment of conviction and an order denying his motion for postconviction relief. He contends that the circuit court erred in denying his motion to withdraw his guilty plea. We disagree and affirm.

¶2 In March 2012, Merkt was charged with one count of burglary of a building or dwelling as party to a crime. After two jury trials that resulted in mistrials,¹ Merkt pled guilty to the charged offense. In return, the prosecutor agreed to recommend a withheld sentence with probation and seven months of conditional jail time.

¶3 At sentencing, the prosecutor made the agreed upon recommendation. In doing so, he acknowledged that Merkt had been in custody for approximately five months. Nevertheless, he asked for an additional seven months in jail, noting that Merkt “doesn’t get credit on the condition time.”² Merkt’s trial counsel, meanwhile, asked for an additional two months in jail, as she had understood the seven-month recommendation to include credit for time served.

¶4 Ultimately, the circuit court withheld sentence, placed Merkt on probation, and imposed twelve months of conditional jail time. The court awarded no credit for time served towards the conditional jail time. However, it told Merkt that if he ever came back for sentencing, he would be entitled to that credit then. Merkt filed a notice of intent to pursue postconviction relief.

¹ Merkt’s first trial ended in mistrial because a prosecution witness identified Merkt in the courtroom in violation of a circuit court order. His second trial ended in mistrial because Merkt and his wife attempted to convey information to the jury that the court had ruled was inadmissible.

² The prosecutor’s position on credit is well-established. See *State v. Gloude-mans*, 73 Wis. 2d 514, 519, 243 N.W.2d 220 (1976) (claims of credit for pretrial incarceration may be made only as to sentences imposed, not to periods of confinement imposed as a condition of probation).

¶5 After filing his notice of intent, but before filing any postconviction motion, Merkt's probation was revoked. The circuit court sentenced him to three years of initial confinement followed by five years of extended supervision. It awarded him credit for time served.

¶6 Subsequent to his probation revocation and resentencing, Merkt filed a postconviction motion to withdraw his guilty plea.³ In it, he alleged that his plea was not voluntarily entered because he did not understand that he would not receive credit for time served towards the recommended conditional jail time. He further alleged ineffective assistance of trial counsel.

¶7 The circuit court held an evidentiary hearing on Merkt's motion at which both Merkt and his trial counsel testified. In his testimony, Merkt blamed trial counsel for incorrectly advising him that he would receive credit for time served towards the recommended conditional jail time. He indicated that he would not have entered his plea but for this misinformation. He also said that he asked trial counsel to stop the sentencing proceeding after the prosecutor noted that Merkt would not get such credit.

¶8 In her testimony, trial counsel acknowledged believing that the prosecutor's recommendation would include credit for time served. However, she disputed Merkt's assertion that he wanted her to stop the sentencing proceeding once it became clear that it would not. According to counsel, she conferred with Merkt about the prosecutor's remarks, and Merkt expressed a desire to go forward

³ Although the State believes this motion was untimely, this court granted Merkt's requests to enlarge the deadline to file a postconviction motion. Merkt had until September 5, 2014, to file a postconviction motion, and he filed one that day.

with the sentencing. This was consistent with his pre-plea desire to get the case over with due to the toll it was taking on his family. Counsel said that both Merkt and his family seemed happy with the result after sentencing.

¶9 In the end, the circuit court found Merkt’s testimony less credible than trial counsel’s because counsel had “less of an interest in the outcome” and because “her testimony is more reasonable and believable.” It therefore concluded that Merkt was not entitled to withdraw his plea and denied his motion. This appeal follows.

¶10 A defendant who seeks to withdraw a plea after sentencing must establish by clear and convincing evidence that withdrawal is necessary to avoid a manifest injustice. *See State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. One way to show a manifest injustice is to demonstrate that a plea was not voluntarily entered. *Id.* A manifest justice also occurs if the defendant received ineffective assistance of counsel. *State v. Dillard*, 2014 WI 123, ¶84, 358 Wis. 2d 543, 859 N.W.2d 44. This requires the defendant to demonstrate both that trial counsel’s performance was deficient and that the deficiency prejudiced the defendant. *Id.*, ¶85.

¶11 Whether a plea was voluntarily entered and whether the defendant received ineffective assistance of counsel are questions of constitutional fact. *Id.*, ¶86; *Brown*, 293 Wis. 2d 594, ¶19. When reviewing questions of constitutional fact, we accept the circuit court’s findings of historical fact unless clearly erroneous, but independently apply constitutional principles to those facts. *See State v. Tullberg*, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120. We may review the entire record when applying the manifest injustice test. *See State v. Cain*, 2012 WI 68, ¶¶29-31, 342 Wis. 2d 1, 816 N.W.2d 177.

¶12 On appeal, Merkt contends that the circuit court erred in denying his motion to withdraw his guilty plea. He renews his arguments that his plea was not voluntarily entered and that he received ineffective assistance of trial counsel. Merkt's claims are premised, in large part, on his assertion that his testimony at the evidentiary hearing was "the more credible account."

¶13 Where, as here, the circuit court acts as finder of fact, and where there is conflicting testimony, the circuit court is the ultimate arbiter of credibility. *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). "[T]his court will not reverse a credibility determination unless we conclude, as a matter of law, that no finder of fact could believe the testimony." *State v. Garcia*, 195 Wis. 2d 68, 75, 535 N.W.2d 124 (Ct. App. 1995).

¶14 Upon review of the record, we cannot say, as a matter of law, that no finder of fact could believe the testimony of Merkt's trial counsel. Based on that testimony, the prospect of credit was not an important consideration to Merkt's decision to enter a plea. He simply wanted to get the case over with and expressed a desire to go forward with the sentencing, even when told that the prosecutor was seeking an additional seven months in jail with no credit for time served.⁴ Thus, the failure to receive credit did not render Merkt's plea involuntary.

¶15 Likewise, we are not persuaded that Merkt received ineffective assistance of trial counsel. It is true that counsel was initially unaware that the prosecutor's recommendation did not include credit for time served. However,

⁴ Merkt's subsequent action confirms this. He spoke at the sentencing hearing, apologizing to the victim, to his family, and to the community. However, he did not raise any concern about the prosecutor's recommendation or the issue of sentence credit.

once she became aware of this fact, she immediately brought it to Merkt's attention and modified her sentencing argument. Her remedial actions rendered any deficient performance on her part harmless. Moreover, Merkt was not prejudiced by her actions because he elected to proceed with the sentencing anyway.

¶16 For these reasons, we conclude that Merkt has not met his burden of showing that withdrawal is necessary to avoid a manifest injustice. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

